DEC 30 1999

(13)

99-62

FILED

DEC 30 1999

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

vs.

JANE DOE, individually and as next friend for her minor children Jane and John Doe, Minor Children; JANE DOE #2, individually and as next friend for her minor child, John Doe, Minor Child; and JOHN DOE, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NORTHSTAR LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Northstar Legal Center is a public interest legal organization located in Fairfax, Virginia that litigates cases involving constitutional law nationally. The Northstar Legal Center recently appeared before this Court representing the respondents in *Board of Regents of the University of Wisconsin v. Southworth*, No. 98-1189 (oral arguments November 9, 1999). The Northstar Legal Center has litigated a number of public forum - equal access cases in which government has excluded private speakers from a forum because of the religious content of the speakers' speech. The Northstar Legal Center supports the policy of the Santa Fe Independent School District which protects religious speech from discriminatory exclusion from a limited forum for student speech. To affirm the Fifth Circuit's judgment will discourage governmental units from enacting equal access policies that protect religious speech expressed by private speakers.

SUMMARY OF ARGUMENT

The Santa Fe Independent School District has properly established a limited public forum for student speech. Although this Court need not resolve the public forum issue to decide this case, it is an additional grounds for reversing the judgment below and upholding the policy. This is the speech

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[1] Both counsels of record have filed letters with the Clerk of Court consenting to the filing of all amicus curiae briefs in this case. Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members and its counsel have made a monetary contribution to the preparation or submission of this brief. Amicus has submitted a request for funding with the Alliance Defense Fund of Scottsdale, Arizona, but that group has not yet acted on the request at the time this brief was filed.

of private, individual students, not government speech. *See Widmar v. Vincent*, 454 U.S. 263 (1981).

The policy is consistent with the public forum doctrine with its mechanism allowing students to select whether to have student speakers at the football games and then select who the speakers will be. Because the forum allows only one speaker at the few home football games, there needs to be some content-neutral selection process to determine which students will speak in this forum, which the school district uses here.

The policy's selection mechanism here is similar to the situation of American voters electing the President of the United States, whose duties include giving an inauguration speech. Over the centuries, Presidents have prayed or made references to God during their inauguration speeches, yet this does not violate the Establishment Clause. "Presidential references to God during an Inaugural Address ... present no risk of establishing religion." *Lynch v. Donnelly*, 465 U.S. 668, 717 (1984).

There is no Establishment Clause violation when private individual speakers express themselves with religious speech in a limited forum they are eligible to speak in. In fact, the school district would violate the students' freedom of speech and engage in unconstitutional content or viewpoint discrimination if it excluded students' religious expression while permitting all other student expression in the forum. The Fifth Circuit's judgment should be reversed.

ARGUMENT

I.

THE SCHOOL DISTRICT HAS CREATED A LIMITED FORUM FOR STUDENT SPEECH WITH ITS FOOTBALL GAME POLICY

A. The School District Has Followed First Amendment Standards To Establish A Limited Forum For Student Speech.

The Santa Fe Independent School District ("Santa Fe") has created a limited forum for student speech with its policy permitting students to speak before the football games. This Court need not resolve the public forum issue to decide this case. This Court can answer the question presented that student-led, student-initiated prayer does not violate the Establishment Clause without reference to the public forum doctrine. However, the court below analyzed the case in terms of the public forum doctrine, which this Court spelled out in *Widmar v. Vincent*, 454 U.S. 263 (1981) and other cases.

When applied properly, the public forum doctrine gives an additional ground to reverse the holding of the Fifth Circuit and to uphold the Santa Fee policy at issue in this case. Santa Fe has designated a small portion of the time before the home football games as a limited forum for student speech.

Public schools may create a forum by policy or practice. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983). Government, like the Santa Fe school district, may also create a "limited forum,"

-- "created for a limited purpose such as use by certain groups, *e.g., Widmar v. Vincent* (student groups) or for the discussion of certain subjects, *e.g., City of Madison Joint District v. Wisconsin Public Employment Relations Commission* (school board business)." *Perry*, 460 U.S. at 45 n.7.

Here, the school district has created a limited forum for student speakers to speak for a short period of time before the home football games. The Fifth Circuit characterized the football game prayer policy as providing "for a student-selected, student-given 'brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games ....'" *Doe v. Santa Fe Independent School District*, 168 F.3d 806, 825 (5th Cir. 1999). Therefore, by policy, Santa Fe has carved out a period of time for private speech by individual students. The limit on the forum is by identity of the speaker, not the content of the speaker's message.

Because the school district has not limited the forum on the basis of subject matter, it cannot prohibit otherwise eligible student speakers from speaking because their messages contain religious content. If Santa Fe allowed all student speech except religious speech, it would violate the freedom of speech rights of the student speakers. "'Where the State has opened a forum for direct citizen involvement,' exclusions bear a heavy burden of justification." *Widmar*, 454 U.S. at 268, quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-559 (1975).

B. The School District's Forum For Student Speech Is Not A Pretext Or Subterfuge To Violate The Establishment Clause.

The Fifth Circuit rejected Santa Fe's argument that it

had created a limited forum for student speech. Instead, the court below found the policy to be an underhanded attempt to violate the Establishment Clause by having the students do what the school district could not do openly - promote religion. *Doe*, 168 F.3d at 822.

The Fifth Circuit placed much emphasis on its view that the forum created by the Santa Fe School Board was not a limited public forum, as asserted by the school district, but was "no forum at all." *Doe*, 168 F.3d at 822. It reasoned that the limited number of speakers, the "monolithically non-controversial nature" of the forum, and the tightly restricted and "highly controlled form of 'speech' involved," *id.*, all militated against labeling such ceremonies as any type of public forum. Therefore, the Fifth Circuit reasoned, because the student speakers were not independent private actors but mere shills for the state, the Santa Fe policy violated the Establishment Clause. *Id.*

The Fifth Circuit erred by assuming that private speakers are not really private actors if the forum is significantly regulated as it is here. Whether a forum is high regulated does not convert private speakers into government actors. Even a private speaker speaking in a nonpublic forum has protected First Amendment rights. *See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985) (Combined Federal Campaign is a nonpublic forum for private charities to solicit contributions from federal employees, and the solicitations are "protected speech occurring in the context of a nonpublic forum." *Id.* at 797.

Therefore, even though the school district has regulated its limited forum, the First Amendment protects the rights of the chosen students to speak at the home football games. The fact that a forum is highly regulated does not eliminate all First

Amendment protections of the private persons speaking there.

The Fifth Circuit erred by misconstruing the critical components of the Santa Fe policy that made the messages the end result of many private decisions that are not directed by the state. In other words, if the school district were trying to ensure that the students would invariably vote for prayer at the football games, the school district created a policy that does not achieve that goal.

The policy builds at least three breakpoints separating the decisionmaking from the government and giving it into the hands of private individuals. First, the students decide whether there is a student speaker or not. Application to the Petition for Certiorari at F1. If the students decide that there shall be a speaker, then the students vote again to select the speaker. *Id.* Then the speaker can choose what to say at the football game. *Id.* The policy does not guarantee that there will be a speaker, and does not guarantee that the message delivered will contain religion. Therefore, this policy is not a surreptitious attempt by the school district to have the students promote religion. There is no pretext or subterfuge here. This is the case of a school district's efforts to accommodate private student speech.

C. The Selection Process of a Majority Vote Is Consistent With the Public Forum Doctrine.

The fact that a majority of students decide whether there will be speakers at the football games, and who those speakers will be, is consistent with the public forum doctrine. The typical equal access case has private individuals or groups select themselves to speak at various times in a place the government opens for expressive activities. *See, e.g., Widmar v. Vincent,* 454 U.S. 263 (1981) (university students decided on their own whether to use campus meeting space).

There is nothing inconsistent with having a public forum, or a limited public forum, where the speakers are selected by popular vote. If the nature of the forum allows only one speaker at a time, then the government needs some selection method to choose who gets the opportunity to speak. The school district could have chosen a random lottery, or class rank to determine the speakers, but it chose a student vote.

There is no concern that this policy allows the majority to impose a consistent religious message on all other students and those attending the football games. Nothing in the plain language of policy insures that the student speakers will give religious messages. In fact, the policy does not even insure that there will be a student speaker at all. The policy does not dictate the content of the message spoken by the student selected. The policy does not contain any viewpoint or contest-based restrictions on the student's speech. The students could vote to have no message at all. If they did decide to have a message and select a student to give it, the student has the independent discretion to choose what he or she will say. This is not a situation in which a majority imposes its ideological views on a dissenting minority.

This situation is analogous to the selection of the United States President, who then delivers his Inaugural Address. Only one person can be President at a time, and only one President can deliver the Inaugural Address. American voters select the President knowing that one thing he will do is give a nationally-televised speech at his inauguration. Although the President is the head of the United States government's executive branch, his Inaugural Address expresses his personal thoughts and is protected under the First Amendment.

Presidents from George Washington to George Bush have prayed during their inaugural addresses. *Lee v. Weisman,*

505 U.S. 577, 634 (1992) (Scalia, J., dissenting). Although the Inauguration is a government event, there is no Establishment Clause violation when the new President refers to religion in his Inaugural Address or requests everyone assembled to bow and pray. "Presidential references to God during an Inaugural Address ... present no risk of establishing religion." *Lynch v. Donnelly*, 465 U.S. 668, 717 (1984). The reason that there is no Establishment Clause violation is because the Inaugural Address is the private speech of the President and is protected under the First Amendment's Freedom of Speech Clause.

Similarly, the student body selects individuals to speak at the football games. Those selected students speak the message they have chosen free of governmental influence or control at a limited forum created by the school district. Santa Fe could not constitutionally prohibit religious speech from these speakers without violating the First Amendment rights of the student speakers. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969).

II.

THERE IS NO ESTABLISHMENT CLAUSE VIOLATION WHEN THE GOVERNMENT ACCOMMODATES PRIVATE SPEECH IN A LIMITED PUBLIC FORUM

A. The First Amendment Prohibits The Government From Singling Out Religious Speech For Exclusion From Its Forum.

Santa Fe's policy allowing students to select a speaker to "deliver a brief invocation and/or message" before the home

football games is a "neutral accommodation" of private student speech, as Judge Jolly stated in his dissent. *Doe*, 168 F.3d at 825. If the school district were to amend its policy to permit all speech by the student speakers except that with religious content, it would engage in unconstitutional content-based or viewpoint-based discrimination. This would violate the constitutional principles laid out in such cases as *Widmar*, *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 967 (1993) and *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995). These cases all held that the government may not exclude speakers from a forum they are eligible to speak in because of the religious content or viewpoint of their messages. "Where the State has opened a forum for direct citizen involvement, exclusions bear a heavy burden of justification." *Widmar*, 454 U.S. at 268.

Most of the cases that have come before this Court involving content-based and viewpoint-based exclusions from public forums have excluded religious speech. One major purpose of the First Amendment, this Court has stated, was to protect religious speech from governmental suppression. In *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995), this Court stated in the majority opinion:

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, or even acts of worship, *Widmar*, supra at 269, n. 6.

Pinette, 515 U.S. at 760.

Of course, the school district can constitutionally exclude people from the forum, like non-students, because they do not meet the initial eligibility standards. *Cornelius,* 473 U.S. at 806. If a student is otherwise eligible to speak, the school district may not limit the message he or she gives at the football game because it is religious. Santa Fe's policy creates a limited forum based on identity of the speaker, not on content of the message. The policy permits only students selected by the student body to speak, but does not limit the content of their messages. It would violate the First Amendment for the school district to limit the speech of the student speakers because of their content. "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Id.*

Even if this Court were to find that Santa Fe operated a nonpublic forum, it still could not prohibit eligible speakers from giving a religious message, because this would be unreasonable viewpoint discrimination. "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,* 473 U.S. at 806. *See also Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983).

Therefore, the school district's policy conforms with the First Amendment by allowing all speech by eligible students. It would violate the First Amendment to single out religious speech for exclusion from this forum.

B. The School District Does Not Endorse The Religious Views Expressed By Speakers In A Public Forum.

When a school district sets up a public forum, it does not endorse the views of any of the private speakers who speak there. Therefore, Santa Fe's policy does not violate the Establishment Clause by permitting students to deliver messages with religious content, when it allows the student speakers to speak on all other topics. Government does not endorse the speech of private citizens simply by allowing them to speak. In *Widmar*, this Court stated:

> An open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. 635 F.2d, at 1317.

Widmar, 454 U.S. at 274. This Court also said in *Widmar*:

> But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Widmar, 454 U.S. at 271-72, n.10.

Again, in *Mergens,* this Court clearly stated that public

schools do not violate the Establishment Clause when they allow student religious groups to meet on campus. *See Mergens*, 496 U.S. at 248-253. This Court in *Mergens* made the helpful observation that government accommodation of private religious speech does not equal government sponsorship of that speech:

> [T]here is a crucial difference between *government* endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.

Mergens, 496 U.S. at 250 (emphasis in the original).

This Court in *Lamb's Chapel* reiterated the basic holding of *Widmar* that permitting private speakers to express religious speech in a forum open for secular speech does not violate the Establishment Clause:

> We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded.

Lamb's Chapel, 508 U.S. at 395.

This Court's decision in *Rosenberger* repeated the principle that religious groups may not be excluded from government forums because of the religious content of their speech:

> More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free

> speech rights to religious speakers who participate in broad-reaching government programs neutral in design. *See Lamb's Chapel*, 508 U.S. at 393-394; *Mergens*, 496 U.S. at 248, 252; *Widmar, supra* at 274-275.

Rosenberger, 515 U.S. at 839.

Also this Court explained in *Pinette*, why it did not violate the Establishment Clause for the Ku Klux Klan to erect a cross in an area near the Ohio state capitol:

> Quite obviously, the factors that we considered determinative in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

Pinette, 515 U.S. at 763.

The government cannot make the right to exercise speech within a forum contingent upon the viewpoint of the speaker or the message. Santa Fe, well aware of its constitutional duty to accommodate private speech in a limited forum, drafted a policy to protect the rights of student speakers from content and viewpoint based discrimination. The Fifth Circuit wrongly ruled that such a policy violated the Establishment Clause, when instead, it fulfilled the school district's duties under the Freedom of Speech Clause.

CONCLUSION

Amicus curiae Northstar Legal Center respectfully requests that this Court reverse the judgment of the Fifth Circuit.

Date: December 30, 1999

Respectfully submitted,

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